



EQUIPMENT LEASING AND FINANCE ASSOCIATION

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Mr. Wayne,

I am writing on behalf of our Members to request further guidance clarifying recent notices relating to sales tax rate changes and their application to existing leases for a definite stipulated period of time. We respectfully request the opportunity to discuss these concerns with you in an effort to comply with the changes, yet minimize the impact of these changes on our North Carolina customers and our industry.

The Equipment Leasing and Finance Association (ELFA) is the trade association representing financial services companies and manufacturers in the \$650 billion U.S. equipment finance sector. ELFA members are the driving force behind the growth in the commercial equipment finance market and contribute to capital formation in the U.S. and abroad. Overall, business investment in equipment and software accounts for 8.0 percent of the GDP; the commercial equipment finance sector contributes about 4.5 percent to the GDP. ELFA members primarily enter into non-cancelable fixed term leases. Our questions herein are relative to a non-cancelable fixed term lease with a purchase option that ‘exceeds’ the greater of \$100 or 1% (“Fixed Term Leases”).

It has been our understanding thus far that the transfer of possession and delivery of equipment in North Carolina triggers the legal incidence of the North Carolina sales tax on Fixed Term Leases. Although the stream of the lease payments is the measure for the tax collection, the law in effect at the time the equipment is delivered in North Carolina is the law that applies for the duration of the contract (often referred to as the ‘pre-existing contract clause’). Historically, North Carolina has kept the rate at the time of the initiation of the lease to be the rate throughout the lease contract regardless of the timing of any rate changes. Thus by “grandfathering” the old rate, the lease was unaffected by rate changes on leases that commenced prior to any rate increases and the sales tax rates remained constant over the life of the lease.

Effective July 28, 2008, G.S. 105-164.16(e) was added to the North Carolina Statutes, which addresses “Simultaneous State and Local Changes”. This provision states that “[W]hen State and local sales and use tax rates change on the same date because one increases and the other decreases but the combined rate does not change, sales and use taxes payable on the following periodic payments are reportable in accordance with the changed State and local rates: (1) Lease or rental payments billed after the effective date of the changes...” Other than the addition of G.S. 105-164.16(e), we are unaware of changes that would otherwise affect the incidence of tax.

With the most recent rate changes the Department provided what appears to be conflicting guidance. Bulletins issued August 2009 advised that gross receipts from the lease of tangible personal property that is delivered to a lessee prior to September 1, 2009 and leased for a definite stipulated period of time will continue to be subject to the 4.5% State tax and applicable county tax for the remainder of the lease. Subsequent bulletins, issued regarding the October 1, 2009 rate change, advised that if a lease or rental agreement was entered into prior to October 1, 2009 for a definite stipulated period of time, payments billed on or after October 1, 2009 would be subject to the new rate of tax.

The goal of our Members is to collect the correct legal tax rates as the legislature intended. As a result, we respectfully request support for the Department's interpretation that the October 1, 2009 rate change applies to *all leases, regardless of the original delivery and start date*. We have also included an example of the current interpretation of the rate changes and are requesting confirmation from the Department (see Attachment A).

We appreciate your prompt attention and will contact you shortly to arrange a convenient time to discuss these matters.

Thank you for your consideration,

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ATTACHMENT A EXAMPLE

We are asking that you confirm the proper rates for our Members to charge on leases existing before the recent changes. We have prepared the following example to illustrate the interpretation of the recent rate changes.

Assumes September 1, 2009 rate increase applies to all leases starting October 1, 2009

Lease Start Date	Rate Prior to 10/01/08			Rate 10/01/08 to 08/31/09			Rate 09/01/09 to 09/30/09			Rate After 10/01/09		
	State Rate	County Rate	Combined Rate	State Rate	County Rate	Combined Rate	State Rate	County Rate	Combined Rate	State Rate	County Rate	Combined Rate
06/01/08	4.25	2.5	6.75	4.5	2.25	6.75	4.5	2.25	6.75 (1)	5.75	2.00	7.75 (2)
07/01/09				4.5	2.25	6.75	4.5	2.25	6.75 (1)	5.75	2.00	7.75 (2)
09/15/09							5.5	2.25	7.75	5.75	2.00	7.75
10/15/09										5.75	2.00	7.75

Note:

- (1) Rates grandfathered, not subject to 9/1/2009 rate change
- (2) Overrides rate grandfathered under 9/1/2009 rate change, now subject to new 10/1/2009 combined rates

ATTACHMENT B

Supporting Information

SB 202, 2009

SECTION 27A.2(a) Notwithstanding G.S. 105-164.4(a), the general rate of tax for sales made on or after September 1, 2009, and before October 1, 2009 is five and one-half percent.

Section 27A.2(b) The introductory language of G.S. 105-164(a) reads as rewritten:

G.S. 105-164.4(a): A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is ~~four and three-quarters percent (4.75%)~~ **five and three-quarters percent**.

Notices issued by DOR:

Technical Bulletin: Aug 2009

Taxable sales, gross receipts, purchases and services that were subject to the 4.5% State rate of tax prior to September 1, 2009 will be subject to the 5.5% State tax on and after September 1, 2009 with the following exceptions:

- Gross receipts from the lease of tangible personal property that is delivered to a lessee prior to September 1, 2009 and leased for a definite stipulated period of time will continue to be subject to the 4.5% State tax and applicable county tax for the remainder of the lease.

Important Notice: Increase in Combined Rate of Tax (Aug 19, 2009)

G.S. 105-164.15A provides for effective dates of a rate increase for services and items taxed at the combined general rate. For services that are provided and billed on a monthly or other periodic basis, the rate increase applies to the first billing period that starts on or after the effective date of the rate increase. For a service billed after it is provided, the first billing period starting on or after September 1, 2009 is subject to the rate increase. For a service billed before it is provided, the first billing period starting on or after October 1, 2009 is subject to the rate increase. For services that are not billed on a monthly or other periodic basis, the rate increase applies to amounts received for services provided on or after September 1, 2009, except amounts received for services provided under a lump sum or unit-price contract entered into or awarded before the effective date or entered into or awarded pursuant to a bid made before the effective date.

Technical Bulletin: September 2009

Leases

A lessee leases tangible personal property from a lessor pursuant to a lease agreement entered into prior September 1, 2009 for a definite stipulated period of time, and the lease terminates during the period September 1, 2009 through September 30, 2009.

If the terms of the agreement provide for automatic extension of the lease which requires no action by the lessee or lessor, the receipts for the extended lease period remain subject to the 4.5% State and applicable local taxes.

If the lease agreement requires that the lessee and lessor renegotiate the lease after the original lease term expires, then the receipts from the renewed lease agreement (extended lease period) are subject to the 5.5% State and applicable local tax rates if the new lease is executed during the period September 1, 2009 through September 30, 2009.

Rate Change Effective 10/1/2009

October 2009

The following scenarios apply to transactions occurring effective October 1, 2009.

Leases

All lease or rental payments billed on or after October 1, 2009, for tangible personal property leased or rented pursuant to a lease or rental agreement are subject to the 5.75% State and applicable local rates. The billing date is the determining factor as to the rate of tax that applies to the gross receipts. If a lease or rental agreement was entered into prior to October 1, 2009 for a definite stipulated period of time, payments billed on or after October 1, 2009 are subject to the new rate of tax.